Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

FRANKLIN D. VIPPERMAN

Plaintiff/Petitioner,

VS.

CARLOS CONCHA; JOHN COMPSTON;
CHUCK GATES; JEFFREY JEANQUART; and
NEVADA DIVISION OF PAROLE AND PROBATION;

Defendants/Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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In Pro se

65 pp

QUESTIONS PRESENTED

Question One

WHETHER DIVISION (Department) OF PAROLE AND PROBATION CAN BE HELD LIABLE UNDER AUTHORITY OF 42 USC Sections 1983, 1985(3), 1986, FOR CONSTITUTIONAL VIOLATIONS PURSUANT TO ITS CUSTOMS, PRACTICES, POLICIES AND PROCEDURES?

Question Two

WHETHER ADMINISTRATORS AND/OR AGENTS OF DIVISION OF PAROLE AND PROBATION CAN BE HELD LIABLE UNDER AUTHORITY OF 42 USC Sections 1983, 1985(3), 1986, FOR THEIR CONSTITUTIONAL VIOLATIONS WHILE ACTING IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES?

Question Three

WHETHER PAROLE BOARD MEMBERS AND/OR AGENTS CAN BE HELD LIABLE UNDER AUTHORITY OF 42 USC Sections 1983, 1985(3), 1986, FOR THEIR CONSTITUTIONAL VIOLATIONS PURSUANT TO THEIR CUSTOMS, PRACTICES, POLICIES, AND PROCEDURES?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

ISSUES PRESENTED TO NINTH CIRCUIT COURT OF APPEALS

Issue One

Whether the lower Federal court conspired with State courts and state officials to deny and deprive the Plaintiff/Appellant of his constitutional rights

Issue Two

Whether the lower Federal and State courts erred by denying and depriving the Plaintiff/Appellant of adequate, meaningful, and effective access to the courts

Issue Three

Whether the lower Federal and State courts erred by denying and depriving the Plaintiff/Appellant of Habeas Corpus relief

Issue Four

Whether the lower Federal court erred by denying and depriving the Plaintiff/Appellant of Default Judgment

Issue Five

Whether the lower Federal court erred by denying and depriving the Plaintiff/Appellant of Preliminary Injunction relief

Issue Six

Whether the lower Federal court erred by denying and depriving the Plaintiff/Appellant of Declaratory Judgment

Issue Seven

Whether the lower Federal court erred by granting the Defendant's/Appellee's motions to dismiss

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

PARTIES TO PROCEEDINGS.....ii

OPINIONS BELOW.....iv

JURISDICTION.....1

STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2-28

REASONS FOR GRANTING THE WRIT.....28-29

CONCLUSION.....30

CERTIFICATE OF MAILING (Separate)

INDEX TO APPENDICES

APPENDIX A Ninth Circuit MEMORANDUM AFFIRMED lower federal court.

APPENDIX B Federal court ORDER granting Department Of Parole & Probation's Motion to dismiss.

APPENDIX C Federal court ORDER granting Defendant's Concha's, Compston's and Jeanquart's Motions to dismiss and Judgment.

APPENDIX D Federal court ORDER granting Defendant Chuck Gate's Motion to dismiss and Judgment.

TABLE OF AUTHORITIES CITED

Cases: Page

Adams v. Keller, 1354 F.2d 137 (10th. Cir. 1981).....16

Benites v. United States Parole Com'n, 595 F.2d 518 (9th. Cir 1978).....16

Block v. Potter, 631 F.2d 233, 235 (3rd. Cir. 1980).....28

Bradford v. Weinstein, 519 F.2d 732 (4th. Cir. 1975).....27

Dent v. West Virginia, 129 U.S. 114 (1989).....28

Dixon v. Hadden, 550 F. Supp. 157 (U.S. D.C. Colo. 1982).....27

Edwards v. United States, 574 F.2d 937, 941-942 (8th. Cir. 1978) cert dis 439 U.S. 1040 (1978).....16

Evans v. Dillahunty, 662 F.2d 522 (8th. Cir. 1981).....27

Franklin v. Shields, 569 F.2d 800 (4th. Cir. En banc 1977) cert den 435 U.S. 1003 (1978).....26,27

Gagnon v. Scarpelli, 411 U.S. 778 (1973).....26

Garafola v. Benson, 505 F.2d 1212)7th. Cir. 1974).....16

Hafer v. Melo, 502 U.S. 21 (1991).....26

Hearn v. Nelson, 496 F. Supp. 1111 (U.S. D.C. Con. 1980).....27

In re Prewit, 503 P.2d. 1326 (S.Ct. Cal. 1972).....27

Joost v. U.S. Parole Commission, 698 F.2d 418, 420 (10th. Cir. 1983).....27

Moody v. Daggett, 429 U.S. 78, 88-90 (1976).....15-16

Monell v. New York City Dept. Of Social Services, 436 U.S. 658 (1978).....25

Morrisey v. Brewer, 408 U.S. 471 (1972).....26

Pain v. Baker, 595 F.2d 197 (4th. Cir. 1979) cert den 444 U.S. 925.....26

Robinson v. United States Board Of Parole, 403 F. Supp. 638, 642-643 (U.S. D.C. N.Y. 1975).....27

Shepard v. Taylor, 556 F.2d 648, 648-652 (2nd. Cir. 1977).....15

Townsend v. Sain, 372 U.S. 293, 312-13 (1963).....21

Tunks v. Sigler, 427 F. Supp. 455 (U.S. D.C. Cal. 1976)..27

Vipperman v. City Of Las Vegas, et al., Case No. CV-LV-86-315 HDM (U.S. DC. S.NV. 1986)19-20

Vipperman v. George Sumner, Case No. CV-LV- 86-LDG (U.S. D.C. S.NV 1986).....21

Vipperman v. State Of Nevada; Eighth Judicial Dist. Ct. Case No. C-25696.....20

Vipperman v. State Of Nevada; Nev. St. Prison Dir. Vernon Housewright and Attorney General Brian McKay, Case No. C-25696.....20

Vipperman v. State Of Nevada; Nev. Prison; and Nevada Dept. Of Parole, Case No. C-25696.....20

Vipperman v. State, 547 P.2d 683 (NV. Sp. Ct. 1976).....5

Williams v. Missouri Bd. Of Probation and Parole, 616 F.2d 697 (8th. Cir. 1981) cert denied 455 U.S. 993.....27

Wolf v. McDonnell, 418 U.S. 539 (1974).....26,28

United States Codes:

Administrative Procedures Act, 5 U.S.C. Section 500..18,25

Freedom Of Information Act, 5 U.S.C. Section 552.....18,25

Privacy Act of 1975, 5 U.S.C.(a) et seq.....18,25

42 U.S.C. Section 1983.....23

42 U.S.C. Section 1985(3).....23

42 U.S.C. Section 1986.....23

Nevada Revised Statutes:

N.R.S. 176.156 Provides for defendant to be provided with Pre-Sentence Report at sentencing.....28

N.R.S. 199.120 Prohibits Perjury and Subornation of Perjury.....13

N.R.S. 199.230 Prohibits Obstruction Of Justice and Preventing or dissuading witnesses from attending..7

N.R.S. 199.412 Prohibits Destroying Evidence.....6

N.R.S. 200.010 Second Degree Murder 5 yrs to Life.....15

N.R.S. 207.190 Prohibits Coercion.....7

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

The MEMORANDUM of the United States court of appeals for the Ninth Circuit Affirming the lower federal court appears at Appendix A to the petition and is unpublished

The ORDERS and JUDGMENTS of the United States district court appears at Appendix B, C, and D, to the petition and are unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit decided my case was July 25, 2003. Appendix A.

No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). And this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Violations of Constitutional Rights afforded to the Plaintiff/Petitioner through the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution Of The United States. And State and Federal laws.

STATEMENT OF THE CASE

Franklin Delano Vipperman, Plaintiff/Petitioner, herein after Vipperman, was arrested while driving into his home driveway in the late evening hours of Friday, April 20, 1973, in Las Vegas, Nevada, by two plain clothed detectives, one black, one white, driving an unmarked late model gold colored 4 door Chevrolet. Vipperman's wife was in his house, and he had just spoken to her over the telephone and told her he was on his way home. Vipperman first believing the police were individuals his ex business partner in a small used car lot William (Frenchy) Parquette had after him, thought they were there to harm him. When he finally realized they were probably police, he began asking them why he was being arrested. They refused to answer him, and only responded with citing over and over again, Vipperman's rights under Miranda.

Vipperman was taken to a hospital whereat his blood was forcibly extracted from him by a nurse, while he was restrained by the two arresting police officers. One of whom's name was **Dallas Kinney: (Note spelling).**
The white arresting officer:

Vipperman was then incarcerated in the Las Vegas City Jail. Two days later Vipperman was finally informed of why he had been arrested and incarcerated, by an attorney Ray Sutton, whom Vipperman had an appointment with that coming Monday to dissolve the partnership between Vipperman and Parquette. Who further informed Vipperman that there was nothing to be concerned about because he had checked the records, and found the police had absolutely nothing against him, and he, the attorney would have Vipperman out of jail Monday morning. Sunday being Easter.

Vipperman's nephew had just gotten to Las Vegas and found that Vipperman had been arrested and charged with open murder. Who then contacted Vipperman's brothers in

Michigan. Who flew to Las Vegas and hired **Harry Eugene Claiborne** to represent Vipperman. They paid Harry E. Claiborne the sum of about $6,500.00 to defend Vipperman and to represent him at a Preliminary Hearing, which was required by Nevada law within 30 days after arrest. And [if] Vipperman was bound over for trial, they were to pay Claiborne an additional $6,500.00 to represent Vipperman at trial. Which Nevada law required a quick and speedy trial within 90 days after arrest.

Harry Eugene Claiborne, pursuant to absolute greed, for the egregious purposes of obtaining the additional $6,500.00 from Vipperman's family [if] Vipperman was bound over for trial, allowed the State of Nevada to deny and deprive Vipperman of a timely State required Preliminary hearing for six (6) months while Vipperman remained illegally and unconstitutionally incarcerated in the Clark County Jail. **Record On Appeal (ROA pp. 294-296).** While Harry E. Claiborne was acting in collusion and conspiracy with prosecutors, to allow them time to come up with a 100% false alleged eye witness, one **David Allan McPeake. Which is common pace in Las Vegas, Nevada: For there never has been a trial in the State Of Nevada, wherein the State did [not] present false witnesses they made "deals" with, and subornated to commit perjury against an accused.**

During a clandestine Preliminary Hearing held on Sept.5, 1973, **(ROA pp. 298-301)** the State's subornated traveling professional Pathologist **John Wallace Graham** testified as to the cause of death of William Parquette that;

> **"Cause of death was due to the loss of blood in the left chest and abdomen, which resulted from the multiple perforations of the left lung and spleen."**
> **(ROA p. 300 L's 8-10).**

And John Wallace Graham's blatantly false and fabricated **Autopsy Report** from the California Toxicology Service, Inc., Los Angeles, California, shows that;

"II. Non-penetrating shotgun wound left forearm and abdomen." And;

"2. There is a 1 ½ " round non-penetrating shotgun wound of the left lower abdominal quadrant with an irregular scalloped border. * * * There is an associated shotgun pellet injury on the lateral aspect of he left thigh comprising of 10 to 12 pellet wounds." (ROA pp. 302-303).

Harry E. Claiborne, at the Preliminary Hearing, had in his possession, in his hands, police department photographs of the Scene Of The Crime and Autopsy photographs and Report that proved far-far beyond any type of reasonable doubt, that both John Wallace Graham and David Allan McPeake were both false witnesses, committing blatant perjury for the State, who had been subornated to commit perjury by police and prosecutors.

For the court records and photographs now in the possession of the Ninth Circuit Court Of Appeals overwhelmingly prove far beyond any type of doubt, that William Parquette was shot **point blank** from less than six inches away, and the shot crossed the top of his left forearm tearing out a chunk of flesh, and directly into his abdomen and completely through the outer walls and into the interior of his stomach. Which was the **[death shot]**. And a second shot was fired from many more feet away, which struck him in his left side, left arm, and left thigh. Which could not have possibly caused death. Thereby proving far beyond doubt that **[all]** of David Allan McPeake's testimony was blatantly false, and subornated by police and prosecutors.

Following the farce, sham, and pretense of the Preliminary Hearing, Harry E. Claiborne received the additional $6,500.00

from Vipperman's family to represent Vipperman at trial, and he then completely and totally deserted Vipperman. And left him to remain illegally and unconstitutionally incarcerated in the Clark County Jail for another year and a half (1 ½ years).

Harry E. Claiborne then assuming that no man could endure the Clark County Jail for two years (2 years) without breaking, made a "Deal" with the outgoing District Attorney who had just lost reelection, to have Vipperman confess to Second Degree Murder. And he had not even bothered to discuss same with Vipperman. When Claiborne informed Vipperman that [he] had made a deal to have Vipperman confess to murder, Vipperman refused same. Harry E. Claiborne then threatened Vipperman that if Vipperman did not take the "Deal", that he would no longer represent Vipperman before the court. Vipperman then fired Harry E. Claiborne.

Vipperman then hired Jeffrey D. Sobel to represent him at trail. And was only allowed sixty (60) days to piece together a defense which had laid dormant for two long years and had never been investigated by Harry E. Claiborne. Even though Vipperman had by absolute accident and fate, came across indisputable exculpatory evidence which proved Vipperman had been framed for murder by the Las Vegas Police, and the Clark County District Attorney's Office, and had furnished same to Harry E. Claiborne. Which Claiborne had absolutely ignored and covered-up.

There have been two (2) different trials in his horrendous miscarriage of justice case. The first farce, sham, pretense, and mockery of justice trial was reversed by the Nevada Supreme Court on direct appeal. **At Vipperman vs. State, 547 P.2d 683 (NV. Sp. Ct. 1976). (ROA pp. 526-528).**

During the first trial in 1975, a **Norman Finley Patchell** testified that a Jack Heath, (Parquette's secret partner) had confess to him, Patchell, that he, Jack Heath, a woman named

Carol, and a body shop man murdered the victim William Parquette, and framed Vipperman. **(ROA pp. 379-395).** And Police Officer **Ted Veach** had to be subpoenaed from out of state as a hostile witness to corroborate parts of Norman Patchell's testimony. **(ROA pp. 396-402).**

Nancy Parker testified to the facts that she was walking past the car lot at the time and place the crime took place, when she heard two (2) shots, with "just a grunt in between". She became scared and began running home which was just around the corner on the next street. When she came to the alley behind the car lot, she stopped and looked down the alley and saw a very big 6' 4" or 6' 5" black man (Vipperman is slight and white) with a big gun in his hands walking away from the back gate of the car lot where the crime took place, get into a car, and drive right past her. She then ran home and told her mother **Dorothy Blosser,** and her brother **James Blosser**, what she had seen and heard. And then she telephoned the police. The police came to their home minutes later and they all gave the police a full report of what had happened. And that police report was later destroyed by police and prosecutors in blatant violation of Nevada Revised Statute **(N.R.S. 199.412) which prohibits the Destroying of evidence.** And Nancy Parker and her mother Dorothy Blosser, and brother James Blosser, were [never] contacted by the police again. **(ROA pp. 404-412).**

Following Nancy Parker's trial testimony, the police and prosecutors arrested her, held her in jail incommunicado so she could not be found by defense/trail attorney, while police officer **Chuck Lee** threatened her all evening and night to change her testimony. But, she refused: So, police officer Chuck Gates then took the stand the following morning and committed blatant perjury for the prosecutors by testifying that Nancy Parker had recanted her testimony to him. Which Nancy Parker vehemently denied doing. **(ROA pp. 413-416).**

Some years later the despicable police officer Chuck Lee was caught in an illegal wire tapping case with the infamous Harry E. Claiborne, Vipperman's original alleged defense attorney in this abominable case, and was discharged from the Las Vegas Police Department. **(ROA p. 417).** And currently owns and operates a brothel in Pahrump, Nevada, close to Las Vegas.

Dorothy Blosser, mother of Nancy Parker, corroborated all of Nancy Parker's testimony. **(ROA pp. 418-423).**

James Blosser, brother of Nancy Parker was scheduled to testify and corroborate Nancy Parker's testimony at trial, but the police and prosecutors threatened him to the effect that if he showed up at court to testify, that they in turn would trump up charges against him that would lead to his incarceration. Which caused James Blosser to be afraid to testify for the defense. **(ROA p. 424 L's 30-32, p. 425 L's 1-6).** In blatant violation of the State's Laws of **Obstruction Of Justice, and preventing or dissuading witnesses from attending. (NRS 199.230. And Coercion (NRS 207.190).**

Tommy Martin was just outside the courtroom ready to testify for the defense that his mother had informed him all about Nancy Parker hearing the two shots, seeing the big black man in the alley with a "big gun" in his hands. And Nancy and her mother Dorothy Blosser and brother James Blosser originally contacting the police the night of the crime, what they told police, and never being contacted again by the police. Martin was arrested **in the presence of the recessed jury**, slammed around the hallway, hand cuffed, falsely and loudly accused of attempting to bribe a witness, and incarcerated incommunicado so he could not be found by the defense to testify. And later being released from incarceration **[after]** the trial was over, and it was too late for him to testify. And [no] charges were ever filed against Martin. **(ROA p. 426 L. 32, p. 427 L's 1-8). In blatant violation of NRS 199.230 supra.**

Robert Davis Jr. was able, available, and willing to testify to the facts that the State's known to them to be false witness **David Allan McPeake** had came to his apartment shortly after Parquette's death, and informed him that very night that he, McPeake, **did not see who had shot Parquette, or know who had shot Parquette. (ROA p. 403).** And ineffective trial/appeal counsel Jeffrey D. Sobel while acting in collusion and conspiracy with police, prosecutors, and trial judge, failed and otherwise refused to bring Robert Davis Jr. forward to testify for the defense.

Vipperman testified at great length in his own defense in both trials, and informed the jury that he personally went to the Las Vegas Police and informed them that William Parquette was dealing in stolen cars. He further telephoned the Department Of Motor Vehicles, and the Federal Bureau Of Investigation (F.B.I.) and informed both of those offices that Parquette was dealing in stolen cars. The F.B.I. and D.M.V. both caught Parquette, Jack Heath, Carol Smith, and David Allan McPeake [all] dealing in stolen cars. Parquette then threatened Vipperman to the effect that he knew it was Vipperman that had turned him into the authorities, and the only thing Vipperman was going to get out of the partnership **"was a face full of desert": Which in Las Vegas simply meant, he was going to kill Vipperman or have Vipperman killed, and discarded into the desert. (ROA pp. 431-449).** When Parquette was killed, the F.B.I. and D.M.V. turned the case over to the Las Vegas Police.

When Vipperman attempted to corroborate his testimony with Agents from the F.B.I., D.M.V., and Police Department Records Clerk who brought with her the records the police had on file concerning the stolen car racket Parquette, Heath, Smith, and McPeake were all four together involved in. And the official records of the stolen cars they had found in their possession at their places of residence and places of business. The biased and prejudiced trial judge wile acting in collusion

and conspiracy with police and prosecutors, **denied and deprived** Vipperman of allowing his defense witnesses from the F.B.I., D.M.V., and Police Records Clerk, to testify in his behalf for the defense. **(ROA pp. 450-468).** And further allowed the prosecutors to blatantly lie and falsely represent to the jurors during summation, that those witnesses never existed in the first instance. That they were only a figment of Vipperman's imagination like everything else he had testified to. Otherwise, they would have came forward and testified. Thereby making Vipperman appear to be untruthful in the eyes and minds of the jury.

The biased and prejudiced trial judge Carl J. Christensen further, but not conclusive of, while acting in collusion and conspiracy with prosecutors and police, wilfully, wantonly, maliciously, illegally, and unconstitutionally impeached the entire testimonies of **Norman Patchell and Nancy Parker**, and Ordered the jury to disregard their entire testimonies.

In between Vipperman's two farce, pretense, and mockery of justice trials, the police and prosecutors [again] threatened Vipperman's defense witnesses to prevent them from coming forward and testifying for the defense. And ineffective trial/ appeal counsel Jeffrey D. Sobel refused and failed to issue compulsory process to compel their attendance, and thereby turned Vipperman's second trial into a blatant farce, sham, pretense, and mockery of justice by not presenting a single crucial witnesses for the defense. **(ROA pp. 488-498).** And further and additionally, failed and refused to bring to the attention of the Nevada Supreme Court on direct appeals, the horrendous, illegal, and unconstitutional acts and actions of police, prosecutors, and trial judge, that denied and deprived Vipperman of his liberty, property, and fair trials. In blatant disregard for Vipperman's constitutional rights of due process and the equal protection of the laws, both state and federal.

The Nevada Department Of Parole And Probation failed and otherwise refused to investigate any portion of Vipperman's history, character, and good reputation in the business and the community. **(ROA pp. 476-487).** And chose instead to act pursuant to its standard **illegal, and unconstitutional, customs, practices, policies, and procedures. In concert and collusion with police, prosecutors, and judges of Las Vegas, Nevada.**

A Department Of Parole And Probation officer, **Willard B. Allen,** appeared at the Clark County Jail shortly after Vipperman's first conviction, and questioned Vipperman. He went along asking questions until Vipperman got to the part of his life that he went into business with William Parquette. Willard B. Allen then shocked Vipperman by stating; **"And that was the man you murdered".** When Vipperman denied the killing of William Parquette, Willard B. Allen then stated; **"You know, if you don't confess to this murder, [we] will recommend the maximum sentence, and you will never get out of prison:"**

Vipperman's attorney Jeffrey D. Sobel had already informed Vipperman that the Agent, and the Department Of Parole And Probation had already been informed by him that Vipperman was taking an Appeal. Therefore the Department Of Parole And Probation were **[not]** to discuss the case with Vipperman during his pre sentence hearing. **(ROA pp. 523-526).**

Nevertheless; because Vipperman would not confess to the crime he had been framed for, the Nevada Department Of Parole And Probation, while acting in concert and collusion with police, prosecutors, and trial judge, maliciously, illegally, and unconstitutionally, submitted to the trial judge, a Pre Sentence Report, which contained known to the Department Of Parole And Probation, blatantly false information. And maliciously recommended a maxim sentence for Vipperman because he would not confess to the crime, and thereby clean-

up all the horrendous illegal and unconstitutional acts and actions of their concerts and cohorts of the police, prosecutors, court, and judges.

As shown above, the State's known to them to be false, and subornated traveling professional testifying alleged pathologist John Wallace Graham, testified at Vipperman's Preliminary Hearing on September 5, 1973, as to cause of death that;

"Cause of death was due to the loss of blood in the left chest and abdomen, which resulted from multiple perforations of the left lung and spleen."
ROA p. 300 L's 8-10).

The Department Of Parole And Probation's Pre-Sentence Report on page 7, states;

"The * * * Preliminary Hearing transcript reflects that * * * Dr. Graham's statement that death was caused by the wound that entered the victim's back."
"(1). The offense was committed by design."
"(3). The fatal shot was fired into the victim's back while he was attempting to flee."
"The Department Of Parole And Probation is of the opinion that there are no facts know to them that would tend to support a recommendation other than the maximum penalty."

Signed _____
Willard B. Allen, Officer
Adult Parole And Probation
District # 4, Las Vegas, Nevada
(ROA p. 522).

And the Nevada Department Of Parole And Probation has known all these many-many years, that their Pre-Sentence Report contains known to them to be blatantly

false representations, and that William Parquette was [not] shot in the back in the first instance. (ROA pp. 305-310).

And trial attorney Jeffrey D. Sobel informed the court at sentencing in regard to the Parole And Probation Report and the Department's customs, practices, policies, and procedures, that in his six (6) years of himself practicing before the court and dealing with the Parole And Probation Department that;

"I think the significance is here and I have seen it in the six years that I have been practicing on matters in front of parole boards that you have got to admit that you are guilty of the crime or you are not going to get parole,"(ROA p. 523 L's 26-30. * * * "and I know from two lie detector's test that he was given, one by an expert from Utah and one by a local lie detector operator that if Mr. Vipperman committed this offense, he really has no memory of it." (ROA 524 L's 9-12). * * * "The report (Nevada Department Of Parole And Probation Pre-Sentence Report) gives absolutely no indication why they are choosing life rather than five years. I wrote to them and I said I will give you a complete list of everybody that knows Vipperman so that you could see what sort of man he is. They never contacted me and I know they never contacted anyone of the family who has been standing behind him all of this time." (ROA p. 526 L's 16-22).

During Vipperman's first trial, he caught the prosecutors and Court Service Officer **in the act of "making deals" with jail inmates to commit perjury against Vipperman in trial, in exchange for their release from incarceration. Which is common place in Nevada, and happens in every major trial that has ever taken place in Nevada. (ROA pp. 428-430).**

In Vipperman's first trial, Scene Of The Crime Photographer Police Officer **Truman Lamb** was subornated by prosecutors to commit blatant perjury against Vipperman, in blatant violation of **NRS 199.120 which prohibits both Perjury and subornation of perjury.** Prosecutors subornated Truman Lamb to falsely testify that the back chain link fence gate to the car lot was **[open]** when he arrived on the scene of the crime and photographed the gate in an erroneous [open] position. Which those erroneous photographs were and still are, the [very key] to the entire case. For it was from those erroneous photographs, the police and prosecutors used to completely and thoroughly subornate their 100% false alleged eye witness **David Allan McPeake.** By alleging that Vipperman came though the opened back gate, shot Parquette, which was supposedly witnessed by McPeake, who was allegedly standing in the opened doorway of a paint shop which was located around four (4) different cinder block walls from the back gate. And then Vipperman allegedly exited through that supposed opened back gate. **(ROA p. 334 L. 17).**

Police Officer **Thomas H. Haney**, who prosecutors Earl Gripentrog and Jeffrey Silver accidentally failed to subornate, testified that **[he]** was the first police officer on the scene of the crime that night, and when he got there that all important back chain link gage was **[closed, and locked closed].** And further, that he climbed up on top of the gate to look for suspects that might be on top of the surrounding buildings. And further climbed on over the top of the [closed and locked closed] chain link fence gate, and down the opposite side to search the back alley for suspects. **(ROA pp. 336-343).** And neither the State nor ineffective trial/appeal counsel Jeffrey D. Sobel brought officer Thomas H. Haney forward to testify in Vipperman's Second trial.

In Vipperman's Second trial, prosecutor **Edward R. Kane** realizing that the police had been caught committing perjury in Vipperman's first trial, re-subornated police officer **Truman Lamb** to testify that the back chain link fence gate was **[closed and locked closed]** when he arrived on the scene, and someone must have opened it before he photographed it in an erroneous open position. **(ROA p. 345).**

In Vipperman's First trial, Police Officer **Dallas Kinney** testified as to being the arresting officer, and identifying certain evidence that was submitted to the jury. **(ROA 353-366).**

In Vipperman's Second trial, prosecutor **Edward R. Kane** believing he could get away with it because of the name similarity, switched witnesses and illegally and unconstitutionally produced a police officer **Delous Kiney** who he knew was a 100% false witness, and he subornated him to commit 100% blatant perjury, as to being the arresting officer. And had him identify certain evidence, which was illegally and unconstitutionally submitted to the jury through his known to him to be 100% false witness, **Delous Kiney,** who Edward R. Kane subornated to commit **100%** perjury. **(ROA pp. 367-374).**

Police Officer **Frank Jergovic** filed a Dead Body Report in this case which states;

> "The victim was **found** by his employee David McPeake **lying on the ground** in front of the paint garage. **He had heard two shots just prior to finding the victim."** **(ROA p. 352).**

And neither the State, nor ineffective trial counsel brought Detective Frank Jergovic forward to testify in either of Vipperman's trials. They have always kept him secreted.

And it is the custom, practice, policy, and procedure of the Las Vegas District Attorney's Office to threaten, incarcerate, and dissuade defense witnesses to prevent them from testifying in trials. And it is further the custom, practice, policy, and procedure of that office to subornate perjury. And further, but certainly not conclusive of, it is the custom, practice, policy, and procedure of Las Vegas prosecutors, to commit blatant perjury themselves. (ROA pp. 488-502).

Vipperman was tried by prosecutors for First Degree Murder. But, the jury in both trials not realizing that Second Degree Murder also carried a possible Life sentence, convicted him of Second Degree Murder [after] the biased and prejudiced trial judge in both trials **Carl J. Christensen ORDERED** numerous jurors who were voting for acquittal, to go back and reconsider their decisions, and deliberate more until they could reach a unanimous verdict. Vipperman was then maliciously sentenced to Life in prison with eligibility of parole after serving five (5) years. Under authority of **NRS 200.010.**

Upon Vipperman's First appearance before the Nevada Parole Board, the prison Warden and Staff recommended that Vipperman be granted parole. **(ROA pp. 600-601).** And Vipperman never in his near fifteen (15) years of imprisonment ever received any type of disciplinary action, or even a Write Up for any infraction of the rules. He was an exemplary prisoner at all times:

In **Shepard vs. Taylor**, 556 F.2d 648, 648-652 (2nd. Cir. 1977), the court held;

"An individual's institutional record is one of the most significant factors in predicting his ability to assume his place in a free society and hence, his eligibility for parole."

Citing **Moody vs. Daggett**, 429 U.S. 78, 88-90 (1976). Id at 652.

See e.g., **Edwards vs. United States**, 574 F.2d 937, 941-942 (8th. Cir. 1978) cert dismissed 439 U.S. 1040 (1978); **Benites vs. United States Parole Com'n**, 595 F.2d 518 (9th. Cir. 1978); **Garafola vs. Benson**, 505 F.2d 1212 (7th. Cir. 1974); **Adams vs. Keller**, 1354 F.2d 137 (10th. Cir. 1981).

Yet the Nevada Parole Board at all times ignored and failed and otherwise refused to give any type of due consideration to Vipperman's exemplary record while incarcerated, and prior to being incarcerated. And chose instead to deny and deprive him of parole because he would not confess to the crime he had been framed for and convicted of. And thereby clean-up the illegal and unconstitutional acts and actions of their concerts and cohorts of the Las Vegas police, prosecutors, courts, and judges, while they were acting in collusion and conspiracy with them, to deprive Vipperman of his liberty.

During Vipperman's First Parole Board Hearing, the Board questioned Vipperman about things Vipperman had never heard of before. And indicated that they had letters in their files from prosecutors and trial judge, that indicated that Vipperman had framed the prosecution witnesses. And further shot the victim in the back. And other things that Vipperman knew to be blatantly false, and he could further prove the assertions and allegations to be false. But, the Board refused to allow Vipperman the opportunity to prove their information to be false with evidence of his own. And further and additionally refused to allow Vipperman the opportunity to view, admit, deny, or controvert in any way shape or form, the false and malicious informations in their files and records, which they were relying upon to a constitutionally significant degree to deny and deprive Vipperman of his liberty and parole. And they denied Vipperman parole, and cited known

to them to be blatantly false reasons for denial of parole.

In the mean time, Vipperman's original alleged defense attorney **Harry Eugene Claiborne**, was appointed to the lower Las Vegas Federal Court as a Federal Judge.

In between Vipperman's First and Second parole board hearings, he was given information from a cousin of **Judy Ahlstrom**, secretary of federal judge Harry Eugene Claiborne, that he was present when **Harry E. Claiborne**, his secretary **Judy Ahlstrom,** and her first cousin **Nykki Kinsley**, executive secretary of the Nevada Pardon Board, and Nevada Parole Board, **[conspired] to keep Vipperman in prison for the rest of his life because he had caused Claiborne problems when he had fired him from being his alleged defense attorney.**

Vipperman near the same time obtained his court records from his trial/appeal counsel Jeffrey D. Sobel, which proved far beyond any doubt that Vipperman had in fact been framed for the murder of William Parquette by police and prosecutors, and denied and deprived of fair trials by the trial judge not only once, but twice.

Vipperman then furnished **Bryn Armstrong, Chairman of the Nevada Parole Board, and the Nevada Department Of Parole And Probation** with hundreds of court records, trial testimonies, police reports, photographs of the autopsy and scene of the crime, and signed statements and letters of witnesses, which overwhelmingly proved far beyond any type of doubt that Vipperman had in fact been framed for murder by police and prosecutors.

Vipperman then managed to inspect his prison files. And therein he discovered many documents from malicious prosecutors **Edward R. Kane, Dan Seaton, and Don Wadsworth**, who were caught red handed attempting to commit perjury in Vipperman's trials, and threatening, and dissuading defense witness to prevent them from testifying. Inter alia, inter alios. **(ROA p. 497).** Who had maliciously sent letters to the prison, department of parole and probation, and parole board, which contained know to all of them to be blatantly false allegations and charges extremely detrimental to Vipperman and his liberty.

Vipperman then petitioned [all] of those involved through the **Administrative Procedures Act, 5 U.S.C. Section 500 et seq., Freedom Of Informations Act, 5 U.S.C. Section 552 et seq.. And the Privacy Act of 1975, 5 U.S.C.(a) et seq..** To be allowed to view the designated false informations in their files. And further petitioned them for Expunction Of False Records. **(ROA pp. 80-97).** For which they **[all]** failed and refused to give Vipperman any consideration whatsoever.

Upon Vipperman's Second parole board hearing, he took a tape recorder into the hearing and left it in the room with the parole board while they deliberated behind his back. And thereby caught them [red handed] making known to them to be blatantly false assertions and allegations. And blatantly false representations about Vipperman and his legal case. And the board allowed **Nykki Kinsley** to voice her opinion, and cast an illegal and unconstitutional **VOTE** to deny Vipperman parole. And her having absolutely [no] authority to do so: Vipperman then formulated the tape recording into a transcript and filed same in the Eighth Judicial District Court of Las Vegas, incorporated as an Exhibit within a Petition For A Writ Of Habeas Corpus. **(ROA pp. 602-614).** And served only

one (1) single copy of the Petition upon the Nevada Attorney General's Office, legal counsel for the Respondents. **Only the Court, the Nevada Attorney General's Office, and Vipperman were aware of the Petition, and the transcript of the parole board hearing incorporated therein.** In their joint attempt to destroy Vipperman's Habeas Corpus action, **and the tape recording of the illegal and unconstitutional parole board hearing they conducted,** the Attorney General's Office contacted the authorities of Jean prison where Vipperman was incarcerated and told them to search for a tape recording of the parole board hearing, which was probably in Vipperman's assigned room. The prison authorities at Jean prison placed Vipperman in isolation, and stole a copy of the parole board tape recording, and gave same to a deputy Attorney General. And following the deputy Attorney General, Bryn Armstrong, and Nykki Kinsley listening to the tape recording of the illegal and unconstitutional parole board hearing Armstrong and Kinsley had conducted at the Jean prison, the three of them, conspiratorially, and collusively, formulated a known to all three of them to be a blatantly perjurious **Affidavit**, signed under oath by Kinsley, attesting that she did not know of any tape recording of a parole board hearing. And that she **[did not] voice her opinion or vote in parole board determinations. (ROA p. 619).** And the deputy Attorney General then filed the known to him to be perjurious Affidavit into Vipperman's Habeas Corpus action, which caused and resulted in, great, immediate, and irreparable damage and harm to Vipperman's Habeas Corpus action against the Nevada Department Of Parole, and the Nevada Parole Board. And they then retaliated against Vipperman by keeping him in prison for the following seven (7) years, until he filed a Civil Rights Complaint against them and a total of 47 defendants in the lower federal court. Which was titled **Vipperman vs. City Of Las Vegas, et al.**, Case No. CV-LV-

86-315 HDM (U.S. D.C. S.NV. 1986). Which caused the Nevada Department Of Parole And Probation, and the Nevada Parole Board, to realize they were in serious trouble, so they finally granted Vipperman parole after him serving over fourteen years (14) years imprisoned. Twice as long as all others convicted of Second Degree Murder, and longer than many convicted of First Degree Murder. And then of course, the Las Vegas federal court wrongfully granted the defendant's frivolous Motions to Dismiss, and allowed [all] forty seven (47) defendants to escape liability with impunity.

Vipperman filed three (3) Petitions For A Writ Of Habeas Corpus in the Eight Judicial District Court of Las Vegas, Nevada. Challenging **his illegal and unconstitutional conviction, and the Nevada Department Of Parole And Probation, and Nevada Parole Board. For their joint and conspiratorial illegal and unconstitutional acts and actions against Vipperman.**

They were titled; **Vipperman vs. State Of Nevada; Eighth Judicial District Court,** Case No. C-25696. **Vipperman vs. State Of Nevada; Nev. St. Prison Dir. Vernon Housewright and Attorney General Brian McKay**, Case No. C-25696. **Vipperman vs. State Of Nevada; Nev. Prison; and Nev. Dept Of Parole**, Case No. C-25696.

The Nevada Eighth Judicial District Court Of Las Vegas, Nevada, buried, covered-up, and failed and otherwise refused to act upon the petitions, or in any manner, shape, or form, inquire into the issues presented to the Court for consideration and review. The Court while conspiratorially covering-up for each other, and their concerts and cohorts of the State Of Nevada, discarded all efforts by Vipperman and his Motions for the appointment of counsel, and the issuance of an Order To Show Cause, and Motion to conduct an Evidentiary Hearing. The court covered-up the petitions for four (4) long

years, and then summarily dismissed them without ever informing Vipperman, or inquire into a single issue presented to the court in the petitions for review and consideration. **See; letter to Judge O'Donnell (ROA pp. 241-244).**

The Nevada Supreme Court refused to allow Vipperman to support his petitions for writs of habeas corpus, supra, or file an opening brief in that court. They simply chose instead to cover-up the petitions for over a year, and then summarily dismissed them without ever inquiring into a single issued presented in the petitions.

Vipperman, after being exhausted by State courts, then filed a Petition For A Writ Of Habeas Corpus in the lower Las Vegas Federal court. Titled; **Vipperman vs. George Sumner**, Case No. CV-LV-86-LDG (U.S. D.C. S. NV. 1986). **(ROA pp. 204-240).**

Challenging his illegal and unconstitutional conviction. That court; **(Harry Eugene Claiborne's Court)** covered-up the petition for five (5) long years, and failed and refused to appoint moved for assistance of counsel, issue a moved for Order To Show Cause, or conduct a moved for Evidentiary Hearing. And summarily denied the petition five years later, without ever having inquired into a single issue presented to the state and federal courts. All in blatant disregard for this court's holdings in **Townsend vs. Sain**, 372 U.S. 293, 312-13 (1963).

Carl J. Christensen, trial judge in both of Vipperman's trials was removed from the bench for taking a $300,000.00 bribe from Casino Owner Benny Binion, through his close friend federal judge Harry E. Claiborne, to cover-up a murder case against his son Ted Binion. **(ROA pp. 189-190).**

Earl Gripentrog, the state prosecutor that originally helped frame Vipperman for murder and railroaded him through the first trial, and have his defense witnesses threatened, and incarcerated to prevent them from testifying, was fired from the District Attorney's Office immediately following Vipperman's first trial, for "getting caught" in his horrendous acts and actions, and allowing the defense to find Norman Patchell and Nancy Parker. And the outrageous newspaper publicity it caused the District Attorney's Office. He then went into private practice. And a few years later "was caught" trying to bribe a Las Vegas Judge. Which the bribing of Las Vegas judges is common place. But, you are not supposed to "get caught". As Gripentrog did. After the F.B.I. threatened to take action if the Las Vegas District Attorney's Office did not, Gripentrog "made a deal" and was convicted and imprisoned. **(ROA pp. 191-195).**

John Mowbray and Noel Manoukian, two of the Nevada Supreme Court judges and very close friends of federal judge Harry E. Claiborne that helped cover-up Vipperman's direct appeal and habeas corpus action in their court, were caught in a scandal with Claiborne, and managed to slither out of it because of being part and parcel of the "Nevada Good Ole Boys". **ROA pp. 196-203A).**

Harry Eugene Claiborne, Vipperman's original alleged defense attorney who had since became a Federal Judge, who allowed this horrendous miscarriage of justice to begin in the first instance, and covered-up in his court, **was convicted of committing crimes while setting on the Las Vegas, Nevada federal court bench, imprisoned, and impeached from Office: (ROA pp. 179-188).**

Vipperman, in his Civil Rights Complaint in this action, under authority of 42 U.S.C. Sections 1983, 1985(3), and 1986, charged the defendants with inter alia, inter alios, that;

> They were "employed by the Nevada Department Of Parole And Probation, and acting in his individual and official capacities, in collusion and conspiracy with other named defendants and concerts and cohorts, under color of law, at all relevant times complained of herein."

And under his **LEGAL CLAIMS** at page 6 of the complaint, charged that;

> "The facts related above and herein, disclose a concerted, systematic, and conspiratorial effort by the Defendant Nevada Department Of Parole And Probation, through their agents, employees, concerts and cohorts in office, Police, Prosecutors, Trial Judge, Defense Counsels, and Legal Counsels of the Nevada Attorney General's Office, to deprive the Plaintiff of his Liberty and Constitutional Rights. Including, but not limited to, those enumerated above, and those enumerated in the succeeding paragraphs and causes of action. **Pursuant to their Practiced Policies and Procedures. <u>And absolute abuse of discretion. Exhibits 14, 14-A, 15, 16.</u>**"

"The charges and language following and above are to be applied and considered as if stated in each and every charge herein."

"The illegal, unconstitutional, unethical, arbitrary, and capricious acts, actions, and inactions of the Defendants that are described above and below and complained of herein, were committed by the Defendants wilfully, wantonly, maliciously, and intentionally, pursuant to collusion and conspiracy between the Defendants, through meetings of the minds, and

each other. And carried out in a callous reckless disregard for the Plaintiff, and his Civil and Constitutional Rights. With an invidious discriminatory intention and design to deprive the Plaintiff of his Liberty, Freedom, and Property interests. And the Equal Protection of the laws. Both State and Federal. While denying and depriving the Plaintiff of all aspects of Due Process of law. For the intentional purposes of violating rights secured to the Plaintiff through the **First, Fourth, Fifth, and Fourteenth Amendments to the Constitution Of The United States. And State and Federal laws."**

And in his **FOURTH CAUSE OF ACTION** at page 12, charged the defendants with;

"While acting in collusion and conspiracy with vindictive prosecutors, trial judge, Police, and numerous Authorities of the Nevada State Prison System; the Defendant Nevada Department Of Parole And Probation, through their Agents, employees, concerts, and cohorts, and members of the Nevada Parole Board and its Commissioners and Hearing Officers, have **solicited; and maliciously disseminated;** and filed in their records, known to them to be false, fabricated, perjurious, and otherwise harmful documents against the Plaintiff. And they have further disseminated same to others, which has caused a great, immediate, and irreparable damage and harm to the Plaintiff, and his liberty and freedom interests. And they have further relied upon same to a constitutional significant degree to deprive the Plaintiff of his liberty and freedom. And have further but not conclusive of, collusively and conspiratorially suppressed same from the Plaintiff, and denied and deprived him of being informed of, confronted with, or the opportunity to admit, deny, or controvert same. Which has caused, and resulted in, great, immediate, and irreparable damage and harm to the Plaintiff's legal actions, and his liberty, property, and freedom interests. And the Plaintiff has moved them through

petitions brought under the **ADMINISTRATIVE PROCEDURES ACT, 5 U.S.C. SECTION 500 ET SEQ., THE FREEDOM OF INFORMATION ACT, 5 U.S.C. SECTION 552, and THE PRIVACY ACT OF 1974, 5 U.S.C. SECTION 552(a) et. seq.,** and the regulations promulgated thereunder. Moved them to be allowed to view the adverse files in their possession. And further, but not conclusive of, moved them for **EXPUNCTION OF FALSE RECORDS**. And they have ignored, refused, and denied and deprived the Plaintiff of all considerations. Pursuant to their illegal and unconstitutional **Practices, Policies and Procedures. And absolute Abuse Of Discretion. Exhibits 22, 23, 24.**"

This High Court in **Monell vs. New York City Dept. Of Social Services**, 436 U.S. 658 (1978), held;

"We conclude, therefor, that local government may not be sued under 1983 for an injury inflicted solely by its employees or agents. Instead, **it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury, that the government as an entity is responsible under 1983.**

Such is the case before this court. In that the illegal, unconstitutional, wilful, wanton, malicious, egregious, acts, actions, and inactions of the defendants/respondents, are in fact their **customs, practices, policies, and procedures. Pursuant to their absolute abuse of discretion.**

In Hafer vs. Melo, 502 U.S. 21 (1991), this High court held;

"We hold that state officials, sued in their individual capacities, are "persons" within the meaning of 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under 1983 solely by virtue of the "official" nature of their acts."

In Pain vs. Baker, 595 F.2d 197 (4th. Cir. 1979) cert denied 444 U.S. 925, the court held;

"We hold today that in certain limited circumstances a claim of constitutional magnitude is raised where a prisoner alleges (1) that information is in his file, (2), that the information is false, and (3) that it is relied upon to a constitutionally significant degree. * * * Id at 201.

The requirement of reliance to a constitutionally significant degree has two dimensions. The first is the nature of the adverse administrative decision made on the basis of erroneous information. If the information is relied on to deny parole or statutory good-time credits, or revoke probation or parole, the inmate's constitutional liberty interest is at stake and the due process clause is called into play. See Franklin vs. Shields, 569 F.2d 800 (4th. Cir. En banc), aff'g in part and rev'g in part 569 F.2d 784 (4th. Cir. 1977), cert den 435 U.S. 1003 (1978); Wolf v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrisey v. Brewer, 408 U.S. 471 (1972).

We think a well pleaded complaint alleging such circumstances would be sufficient. In a close case, however, the benefit of the doubt should be given the inmate. Id at 202.

Vipperman has been convicted, sentenced, denied parole, his parole has been revoked, and he has been denied and deprived of being released from parole, all because of the respondent's reliance upon to a constitutionally significant degree, false informations they have conspiratorially fabricated, solicited, disseminated, and filed in their records pertaining to Vipperman. And they have absolutely refused and failed to give him the opportunity to view, admit, deny, or controvert their false informations in any way shape or form. Or give any type of due consideration to favorable and exculpatory evidence in Vipperman's favor.

The Respondents have always had a **[duty]** to investigate and verify the informations in their files. **Jones v. Johnson**, 402 F. Supp. 992 (U.S. D.C. Pa. 1975).

See e.g., **Robinson v. United States Board Of Parole**, 403 F. Supp. 638, 642-643 (U.S. D.C. N.Y. 1975); **Tunks v. Sigler**, 427 F. Supp 455 (U.S. D.C. Cal. 1976); **Franklin v. Shields**, 569 F.2d 784, (4th. Cir. In Banc 1977), cert denied 435 U.S. 1000 (1978); **Bradford v. Weinstein**, 519 F.2d 732 (4th. Cir 1975); **Williams v. Missouri Bd. Of Probation and Parole**, 616 F.2d 697 (8th. Cir. 1981) cert denied 455 U.S. 993; **Evans v. Dillahunty**, 662 F.2d 522 (8th. Cir. 1981); **Dixon v. Hadden**, 550 F. Supp. 157 (U.S. D.C. Colo. 1982).

"Petitioner must of course be afforded access to reports or documents relied upon by the Commission and the opportunity to challenge their contents." **Joost v. U.S. Parole Commission**, 698 F.2d 418, 420 (10th. Cir 1983); **In re Prewit**, 503 P.2d 1326 (S.Ct. Cal. 1972); **Hearn v. Nelson**, 496 F. Supp. 1111 (U.S. D.C. Conn. 1980).

N.R.S. 176.156 Provides: 1. "The court [shall] disclose to the district attorney, [to] the counsel for the defendant and [to] the defendant, the factual content of the report of the pre sentence investigation and the recommendations of the probation service and afford an opportunity to each party to comment thereupon."

The Pre-sentence Report in this case that contains blatantly false information, and is relied upon by the respondents to a constitutionally significant degree, was secreted and suppressed from the Petitioner for many-many years, until he finally obtained same from his alleged trial/appeal counsel only after threatening a law suit against him.

"The touchstone of due process is protection of the individual against arbitrary action by government." **Dent v. West Virginia**, 129 U.S. 114 (1889); **Wolf v. McDonnell**, 418 U.S. 539 (1974); **Block v. Potter**, 631 F.2d 233, 235 (3rd. Cir. 1980).

REASONS FOR GRANTING THE PETITION

The illegal and unconstitutional conspiracy charged and complained of began when Vipperman was originally arrested on or about April 20, 1973, and has continued unabated through this very date: And the latest overt act committed by the defendants/respondents that damages have flowed from is May 1, 2000 **(ROA p. 11)**. And Vipperman timely filed his Civil Rights Complaint in this action on November 13, 2000. All of the defendants/respondents had knowledge of the illegal and unconstitutional acts and actions that were being committed against Vipperman, and they had the power to prevent or aid in the preventing of the commission of the same, and they neglected and refused and failed to do so.

The Nevada Division Of Parole And Probation and its administrators, agents, and parole and probation officers, and the Nevada Parole Board, are totally and completely out of control. The Nevada Attorney General's Office defends their illegal and unconstitutional acts and actions, and the State and Federal Courts of Nevada protect them. Therefore, they have absolutely no fear of the law, or of being held accountable and/or liable for their illegal and unconstitutional acts and actions, conducted pursuant to their customs, practices, policies, and procedures, and absolute abuse of discretion. For they sincerely consider themselves far above all laws. And **[because]** the Nevada courts, state and federal give them total and complete discretion, and refuse to hold them accountable in any way shape or form, they have **[no]** fear of violating constitutional rights of all others. For they know they will be protected by the courts of Nevada, and the Ninth Circuit Court Of Appeals. As the circuit courts are divided on many of the issues presented in this action.

Therefore; the Constitutional Rights of tens of thousands of lives in Nevada are being violated and abused continually. And same will never cease in Nevada, or many other States, unless this court holds them liable and accountable for their illegal and unconstitutional acts, actions, and inactions.

CONCLUSION

For all of the reasons above, and justice, the petition for a writ of certiorari should be granted.

Dated this 19th. Day of September, 2003.

Respectfully submitted;

Franklin D. Vipperman

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702-207-6356
Plaintiff/Petitioner In Pro se

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JULY 25, 2003

FRANKLIN D. VIPPERMAN,
Plaintiff-Appellant,

v.

CARLOS CONCHA; JOHN COMPSTON; CHUCK GATES; JEFFREY JEANQUART; NEVADA, DIVISION OF PAROLE AND PROBATION,
Defendants-Appellees.

No. 03-15416
D.C. No.
CV-S-00-1355-RLH (RJJ)
MEMORANDUM

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding
Submitted July 21, 2003

Before: LEAVY, HAWKINS, and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.
** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Franklin Vipperman appeals the district court's dismissal of his civil rights action filed against the Nevada Division of Parole & Probation ("NDOPP") and four individual defendants. We have jurisdiction under 28 U.S.C. Section 1291, and we affirm.

Vipperman is currently on parole following a 1978 second-degree murder conviction. Vipperman's complaint asserts claims under 42 U.S.C. Sections 1983, 1985, and 1986 ("the civil rights statutes"), as well as 18 U.S.C. Section 1961-1968 ("RICO").

Vipperman's claims against the NDOPP and his monetary claims against the individual defendants sued in their official capacities are barred by the Eleventh Amendment. See Doe v. Lawrence Livermore Nat'l Lab., 131 F.3rd 836, 838 (9th. Cir. 1997) (addressing Section 1983); N.R.S. 41.031, 213.1071 - 213.1073.

As for the individual defendants sued in their individual capacities, Vipperman's first two sets of allegations challenge the NDOPP's parole decisions in 1981 and 1997. The civil rights statutes can provide Vipperman with no relief because the applicable statutes of limitations have expired.

The individual defendants are Carlos Choncha, John Compston, Chuck Gates, and Jeffrey Jeanquart.

See also Cerrato v. San Francisco Community College Dist., 26 F.3rd 968, 975 (9th. Cir. 1994) (addressing Sections 1985, 1986); Bair v. Krug, 853 F2d 672, 673-74 (9th. Cir. 1988) (addressing RICO).

Vipperman's third set of allegations also fails to state a claim. Vipperman cannot use the civil rights statutes to challenge the NDOPP's failure to modify his life sentence after he served ten years on parole. Vipperman's claim is barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), because success on the claim would necessarily imply the invalidity of Vipperman's current parole status.

Vipperman's forth set of factual allegations claim that parole officials have relied on false information when evaluating Vipperman's parole status. Vipperman contends that any document suggesting that Vipperman is responsible for the 1973 murder supporting his conviction is "false".

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42 U.S.C. Section 1986 (providing for a one-year limit); McDougal v. County of Imperial, 942 F.2d 668, 673-74 (9th. Cir. 1991) (holding that actions under Section 1985 "are governed by the same statute of limitations as actions under Section 1983"); Perez v. Seevers, 869 F.2d 425, 426 (9th. Cir. 1989) (per curiam) (applying Nevada's two-year statute of limitations to a Section 1983 claim).

N.R.S. 176.003 provides, in relevant part:

> At any time after a prisoner has been released on parole and has served . . . 10 consecutive years on parole in the case of a prisoner sentenced to life imprisonment, the state board of parole commissioners, upon the recommendation of the division, may petition the court of original jurisdiction requesting a modification of sentence.

Vipperman's attempt to expunge from his files any documents indicating his responsibility for the murder supporting his conviction or challenging the use of these documents is barred by Heck. See Butterfield v. Bail, 120 F.3r 1023, 1024 (9th Cir. 1996). Vipperman's attempt to expunge information related to his 1997 parole violation hearing is barred by the relevant statutes of limitations. See supra at n.2.

Vipperman also asserts a RICCO theory against the individual defendants based on his four claims. None of Vipperman's claims can support relief under RICO, however, because Vipperman's alleged injuries do not involve "business or property," and his personal injuries are not compensable under RICO. See 18 U.S.C. Section 1964(c); Ove v. Gwinn, 264 F.3rd 817, 825 (9th. Cir. 2001).

We have reviewed Vipperman's other challenges to the district court's interlocutory decisions and find Vipperman's challenges to be without merit.

AFFIRMED.

FILED
Apr 17 10:36 AM' 01

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Plaintiff,

vs.

NEVADA DEPARTMENT OF PAROLE, AND PROBATION, et al.,

Defendants.

_____/

CV-S-00-1355 RLH(RJJ)

ORDER

(Motion to Dismiss #20)

Before the Court is **Defendant Nevada Department Of Parole and Probation's Motion to Dismiss** (#20 filed March 1, 2001). Defendant's Opposition (#26) was filed March 8, 2001, and Defendant filed its Reply (#29) on March 15, 2001.

On November 13, 2001, Plaintiff, Franklin Vipperman, filed a Civil Rights Complaint, in proper person, against Defendant Department of Parole and Probation and four individuals as defendants. Plaintiff's Complaint alleges civil rights violations under 42 U.S.C. Section 1983, violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970; and violation of Plaintiff's First, Fifth, Sixth, and Fourteenth Amendment rights.

Defendant filed this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), upon the ground that Plaintiff has failed to state a claim upon which relief may be granted.

Because the Court finds that Mr. Vipperman's claims against the Nevada Department of Parole and Probation are barred under the Eleventh Amendment, the Court will grant Defendant's Motion to Dismiss.

Background

Plaintiff, Franklin Vipperman, is currently on parole after serving a sentence of life imprisonment, with the possibility of parole, for his 1878 conviction of Second Degree Murder for shooting William "Frenchy" Parquette on April 20, 1973. Mr. Vipperman has always maintained that he is innocent, and alleges that he was framed, first by the "real" murder, and later by police, prosecutors, a trial judge, his defense attorneys, legal counsel for the Nevada Attorney General's Office, and Defendant Nevada Department of Parole and Probation.

Plaintiff's pro se complaint is conclusory and only vaguely describes facts in support of his four causes of action. Plaintiff's first cause of action alleges that Federal Judge Harry Claiborne, Plaintiff's former defense attorney, Judy Ahlstrom, Mr. Claiborne's secretary, and Nykki Kinsley, Executive Secretary of the Nevada Pardon and Parole Boards, and cousin of Judy Ahlstrom, conspired to keep Plaintiff in prison for the rest of his life. The precise conspiracy is unclear from Plaintiff's recitation of facts, because Plaintiff does not provide any specifics of dates of occurrences. Apparently, Plaintiff believes Judy Ahlstrom "illegally voicing her opinion." lied to the Nevada Parole Board during Plaintiff's second parole hearing, and convinced them to deny his request for parole, despite the fact that Plaintiff had submitted "hundreds of pages of Trial Transcripts which unequivocally proved and evidenced that the Plaintiff had in fact been framed for murder, and

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The individual defendants have not been properly served and have not filed a responsive pleading in this action. Therefore, the Court does not reach the issue of whether the State's sovereign immunity shields the individually named defendants from liability for actions taken in their official capacities.

railroaded through the courts." Compl. At 7, lines 18-20. Plaintiff asserts this resulted in "Respondents arbitrarily, capriciously, illegally, and unconstitutionally keeping Plaintiff in prison for the following (7) years."Compl. At 8, lines 27-28.

Plaintiff's second cause of action alleges that he was brought before the Parole Board and "denied and deprived of all facets of minimum due process, and wilfully, wantonly, intentionally, and maliciously returned to Prison. For drinking." Compl. at 10, lines 16-18. Plaintiff does not allege any specific facts or dates regarding this incident, but seems to argue that the Parole Board denied him due process, because the Board has him returned to prison for drinking, a violation of parole, despite the fact that nine "good upstanding citizens" testified that he had never displayed a proclivity for violence while drunk or sober. Compl. at 10, lines 20-24.

In his third cause of action, Plaintiff asserts he was denied release from parole despite having presented to Defendant Chuck Gates "hundreds of Trial Transcripts, Documents, Court Records, Police Reports, Testimonies, Scene of the Crime and Autopsy Photographs, News Paper Articles, Parole Board Hearing Transcript, and numerous other documentary evidence, which unequivocally proved the Plaintiff had been framed for murder by Police and Prosecutors, railroaded through two different trials by trial judge, and sold out by his alleged defense attorney at trial, and on Appeals. And further kept in Prison through a conspiracy between the Parole Board, Police, Prosecutors, alleged Defense Attorneys, and Trial Judge." Compl. at 10-11. On May 1, 2000, Defendant Jeffrey Jeanquart allegedly informed Plaintiff that Carlos Choncha had denied Plaintiff's request for release from parole. Plaintiff further asserts that he was arbitrarily and capriciously removed

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Plaintiff's claim is based on his apparent belief that after serving ten years of parole, he has the right to have his sentence changed from life to twenty years, so that he may be completely discharged from parole.

from minimum parole status and returned to maximum status, but does not allege any facts or surrounding circumstances. Plaintiff does not describe any action taken by the forth named defendant, John Compston, an employee of the Nevada Department of Parole and Probation.

In his fourth cause of action, Plaintiff alleges that "While acting in collusion and conspiracy with vindictive prosecutors, trial Judge, Police, and numerous Authorities of the Nevada State Prison System; the Defendant Nevada Department of Parole and Probation...have **solicited; and maliciously disseminated;** and filed in their records, known to them to be false, fabricated, perjurious, and otherwise harmful documents against the Plaintiff." Compl. at 12, lines 16-22 (emphasis in original). This claim appears to be based upon Plaintiff's repeated assertions that he was framed during his underlying murder conviction, and therefore, documents and records related to that conviction are false, and the Defendants "have further relied upon same to a constitutionally significant degree to deprive the Plaintiff of his liberty and freedom." Compl. at 12, lines 24-25.

Plaintiff asserts he is seeking injunctive and declaratory relief. However, Plaintiff does not elaborate any further upon the issue of relief.

Analysis

Defendants seek dismissal of Plaintiff's Complaint upon the grounds that: (1) Defendant is a state agency, and the state of Nevada has not waived its Eleventh Immunity from suit; (2) Plaintiff's claims fail as a matter of law; and (3) many of Plaintiff's allegations are barred by the statute of limitations.

Defendant brought its Motion to Dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Because Defendant is immune from suit under the Eleventh Amendment, the Court finds dismissal appropriate pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, and declines to address Defendant's remaining arguments.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Const. Amend. XI

Under this Amendment, a state or its agencies may not be sued in federal court without its consent, see O'Connor v. State of Nevada, 686 F.2d 749, 750 (9th. Cir. 1982); see also U.S. Ecology Inc. v. State of Nev., Dept. of Human Resources, 557 F. Supp. 464 (D. Nev. 1983) citing Washoe Tribe of Nev. and Calif. v. Greenley, 674 F.2d 816, 818 (9th. Cir. 1982), unless Congress has exercised its power under Section 5 of the Fourteenth Amendment to override immunity. See Will. v. Mich. Dep't of Police, 491 U.S. 58, 66 (1989).

"Congress, in passing Section 1983, had no intention to disturb the States' Eleventh Amendment Immunity." Id. (quoted in Rounds v. Or. State Bd. Of Higher Educ., 166 F.3d 1032, 1035 (1999).

Thus, if the State of Nevada has not waived it's Eleventh Amendment immunity, this Court is barred from exercising federal question jurisdiction over the Defendant in this matter. Cf. Rounds, 166 F.3d at 1035-36.

Plaintiff cites Nevada Revised Statutes Section 41.031 as support for his assertion that the State of Nevada has waived immunity for suits against itself, its agencies and its subdivisions.

However, Nevada explicitly refused to waive its sovereign immunity under the Eleventh Amendment. See Nev. Rev. Stat. Section 41.031(3) (stating "The state of Nevada does not waive its immunity from suit conferred by Amendment XI of the Constitution of the United States."); See also, O'Connor, 686 F.2d at 750.

Because the Court finds Defendant is shielded from liability by its Eleventh Amendment sovereign immunity, the Court must dismiss Plaintiff's cause of action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. The Court declines to reach the merits of Defendant's alternative arguments in favor of dismissal.

Accordingly, for good cause appearing, IT IS HEREBY ORDERED that Defendant Nevada Department Of Parole and Probation's Motion to Dismiss (#20) is GRANTED.

Dated: April 16, 2001.

"s/ Roger L. Hunt".
ROGER L. HUNT
U.S. District Judge

C-1

FILED
Dec 19, 2:44 PM 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Plaintiff, No. CV-S-00-1355-RLH

vs. **ORDER**

NEVADA DEPARTMENT OF (Motion to Dismiss #52 & 55)
PAROLE AND PROBATION,
et al.,

Defendants.
_____/

Before the Court is Defendant Concha's **Motion to Dismiss** (52), filed October 31, 2002, and Defendants Compston and Jeanquart's **Motion to Dismiss** (#55) filed November 6, 2002. The Court has also considered Plaintiff's Oppositions (#54 and #56), filed November 6, 2002, and November 13, 2002, respectively, and Defendant's consolidated Reply (#57), filed November 19, 2002.

BACKGROUND

On November 13, 2001, Plaintiff, Franklin Vipperman, filed a Civil Rights Complaint, in proper person, against Defendant Department of Parole and Probation and four individuals as defendants. Plaintiff's Complaint alleges civil rights violations under 42 U.S.C. Section 1983, violation of the Racketeer Influenced and Corrupt Organization Act ("RICO") of 1970; and violation of Plaintiff's First, Fifth, Sixth, and Fourteenth Amendment rights.

The Court previously dismissed the Nevada Division of Parole and Probation. Order #35. The Court found that Plaintiff's claims against the Nevada Division of Parole and Probation were barred under the Eleventh Amendment; however, because the individual defendants had not at that time been properly served and therefore, had not filed responsive pleadings in this action, the Court did not reach the issue of whether the State's sovereign immunity shields the individually named defendants from liability for actions taken in their official capacities. Defendants have been served and now file this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), upon the ground that Plaintiff has failed to state a claim which relief may be granted.

Plaintiff is currently on parole after serving a sentence of life imprisonment, with the possibility of parole, for his 1978 conviction of Second Degree Murder for shooting William "Frenchy" Parquette on April 20, 1973. Plaintiff has always maintained that he is innocent, and alleges that he was framed, first by the "real" murder, and later by police, prosecutors, a trial judge, his defense attorneys, legal counsel for the Nevada Attorney General's Office, and Defendant Nevada Department of Parole and Probation.

Plaintiff's pro se complaint is conclusory and only vaguely describes facts in support of his four causes of action. Plaintiff's first cause of action appears to assert that the Department of Parole and Probation conspired with certain individuals "to keep Plaintiff in prison for the rest of his life." Compl. at 7, 1.14. It appears that this allegation relates to a parole hearing held on July 29, 1981. Exhibits 17 and 18 attached to Complaint. The second claim challenges the decision not to "modify" Plaintiff's sentence after serving ten

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Plaintiff's claim is based on his apparent belief that after serving ten years of parole, he has the right to have his sentence changed from life to twenty years, so that he may be completely discharged from parole.

(10) years of his parole and a parole violation charge filed August 8, 1997. Plaintiff's third claim also challenges the denial of Plaintiff's request to modify his sentence. Plaintiff's fourth claim, appears to assert that the Department's file, relating to the Plaintiff, contains false information. This claim appears to be based upon Plaintiff's repeated assertions that he was framed during his underlying murder conviction, and therefore, documents and records related to that conviction are false, and the Defendants "have further relied upon same to a constitutionally significant degree to deprive the Plaintiff of his liberty and freedom." Compl. at 12, lines 24-25.

DISCUSSION

Plaintiff asserts he is seeking injunctive and declaratory relief. Defendants seek dismissal of Plaintiff's Complaint upon the grounds that: (1) Plaintiff failed to timely serve the Summons and Complaint pursuant to Fed. R. Civ. P. 4; (2) Defendants are not subject to suit and are entitled to Eleventh Amendment immunity; (3) Plaintiff's claims fail as a matter of law; (3) Defendants are entitled to qualified immunity; and (4) many of Plaintiff's allegations are barred by the statute of limitations.

Motion to Dismiss Standard Under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Yamaguchi v. U.S. Dept. of the Air Force, 109 F.3d 1475, 1481 (9th. Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in light most favorable to [p]laintiffs." Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th. Cir. 1999). Dismissal is appropriate

"only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th. Cir. 1988).

Statute of Limitations

Section 1983 claims are subject to a two (2) year statute of limitations in Nevada. Perez v. Seevers, 869 F.2d 425 (9th. Cir. 1989). Plaintiff's first and second causes of action take issue with hearings in 1981 and 1997. The parole hearing held on July 29, 1981, is beyond the applicable statute of limitations as well as the alleged parole violation charge of August 8, 1997. Exhibits 17 and 18 attached to Complaint, Complaint at p. 10, 1.2.

Defendants in their Official Capacity

Defendants are sued, in part, as state officials. A state is not a person for the purposes of 42 U.S.C. Section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Likewise, state employees acting in their official capacities are immune. Doe v. Lawerence Livermore Nat. Laboratory, 131 F.3d 836, 839 (9th. Cir. 1997). The same reasoning is applicable to 42 U.S.C. Sections 1985 and 1986. See Rode v. Dellarciprete, 317 F. Supp. 721 (M.D. Pa. 1985). Therefore, Defendants cannot be sued under these statutes in their official capacities.

Furthermore, Defendants cannot be sued in federal court in their official capacity unless there has been a waiver of the Eleventh Amendment. Congress did not abrogate the Eleventh Amendment when it enacted Section 1983, Rounds v. Oregon State Board of Higher Education, 166 F.3d 1032, 1053 (9th. Cir. 1999), and the state of Nevada has elected to maintain its Eleventh Amendment immunity. NRS 41.031(3). The same analysis is applicable to Sections 1985 and 1986. Therefore, Defendants are immune from suit on these claims in their

official capacities.

Plaintiff's Claims Fail as a Matter of Law

It is unclear whether Plaintiff is attempting to challenge his murder conviction, however, such a claim is improper under Section 1983. Edwards v. Balisok, 520 U.S. 341 (1997). The Supreme Court held that 42 U.S.C. Section 1983 cannot be used to assert allegations which would necessarily imply the invalidity of punishment imposed. See also Butterfield v. Bail, 120 F.3d 1023 (9th. Cir. 1997) (claim that false information was used in parole proceedings not cognizable under Section 1983). Plaintiff is also barred from challenging decisions of the parole board. Id. At 1024. (Allegation that false information was used to find inmate ineligible for parole necessarily implicates the validity of the denial of parole and, therefore, the inmate's continuing confinement). Additionally, Plaintiff has no right to a modification of his sentence as that is a discretionary act. NRS 176.033(2). The statute provides that the parole board "may" petition the court to modify the parolee's sentence and the court "may" grant the modification. Id. Therefore, Plaintiff cannot challenge the decision to deny his request for modification. See Neal v. Hargrave, 770 F. Supp. 553, 557-58 (D. Nev. 1991) (Plaintiff has no property right in discretionary work credits therefore cannot make a constitutional challenge). Finally, the Court is unsure of the exact nature of the fourth claim in the Complaint concerning alleged false information in the Department's file, however,

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The statute provides in pertinent part:

> [after 10 consecutive years on prole from a life sentence] the state board of parole commissioners, upon the recommendation of the division, may petition the court of original jurisdiction requesting a modification of sentence... Upon hearing the recommendation of the state board of parole commissioners and good cause appearing, the court may modify the original sentence...

according to Butterfield, 120 F. 3d 1023, Plaintiff cannot contest his conviction therefore the "information" concerning his crime cannot be challenged in this action. Therefore, the fourth claim fails to allege any cognizable constitutional claim.

Finally, Section 1983 requires personal involvement for liability to attach. Ybarra v. Reno Thunderbird Mobile Home Village, 723 F. 2d 675, 680 (9th. Cir. 1984). Liability under Section 1983 requires: (1) personal involvement in the constitutional deprivation or (2) causal connection between a supervisor's wrongful conduct and the constitutional violation. Mackinney v. Nielsen, 69 F. 3d 1002, 1008 (9th. Cir. 1995). Plaintiff has not alleged any personal actions by the Defendants that could support a 1983 claim.

Plaintiff is also unable to allege claims under Sections 1985 or 1986. Section 1985(3) applies to conspiracies to violate Section 1983. Plaintiff also references Section 1985(2), however, fails to allege any facts that support a claim under this subsection. A complaint must specify the actual alleged conspiracy actions. See Karim-Phanhi v. LA Police Dep't, 839 F.2d 621, 626 (9th. Cir. 1988). Plaintiff's complaint fails to allege any conspiratorial actions by Defendants, and therefore, Plaintiff cannot proceed under Section 1985. Moreover, conspiracies to violate a plaintiff's constitutional rights fall under 42 U.S.C. 1985(3) which requires a class based, invidiously discriminatory animus. Bagley v. CMC Real Estate Corp., 923 F. 2d 758, 763 (9th. Cir. 1991). Section 1985(3) requires that "the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights." Gerritsen v. de la Madrid Hurado, 819 F.2d 1511, 1519 (9th. Cir. 1987). Plaintiff's complaint makes no allegation of a class-based animus to support a Section 1985(3) claim. Finally, a Section 1986 claim requires a valid Section 1985 claim. Malsh v. Garcia, 971 F. Supp. 133 (S.D.N.Y. 1997). As Plaintiff has not asserted a viable section 1985 claim, any

Section 1986 claim must also fail.

RICO

Plaintiff's oppositions contain brief references to the RICO statute apparently in reference to fees for supervised parole. Plaintiff's oppositions at p.6. The federal statute has been consistently interpreted to not apply to allegations of personal injuries. Oscar v. Students Coop. Assn., 965 F. 2d 783, 785 (9th. Cir. 1992). ("[I]t is clear that personal injuries are not compensable under RICO,"); Doe v. Roe, 958 F.2d 763, 767-78 (7th. Cir. 1992) ("terms 'business or property' are, of course words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom...all other courts construing this language have likewise concluded that a civil RICO action cannot be premised solely upon personal or emotional injuries.") RICO statutes are intended to combat organized crime and invasions of legitimate businesses, not to provide tort actions for personal injuries. Oscar, 965 F.2d at 786. Additionally, a RICO claim requires the existence of racketeering activity. This requires two (2) predicate acts in order to support a RICO claim. See Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th. Cir. 1991). Plaintiff fails to plead a valid RICO claim in his Complaint nor is one set forth in his opposition papers.

CONCLUSION

For the foregoing reasons the Court must dismiss Plaintiff's causes of action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motions to Dismiss (352 and #55) are GRANTED.

Dated: December 19, 2002.

"s/Roger L. Hunt"
ROGER L. HUNT
United States District Judge

C-8

FILED
NOV 23 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Petitioner,

JUDGMENT IN A CIVIL CASE

vs.

CV-S-00-1355 RLH (RJJ)

NEVADA DEPARTMENT OF PAROLE AND PROBATION et al.,

Respondents.
_____/

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered It's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision Has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motions to dismiss (#52 & #55) are granted. Judgment is entered for the defendants and against plaintiff Franklin D. Vipperman.

December 23, 2002

LANCE S. WILSON, CLERK
By:_____
Deputy Clerk

D-1

FILED
2003 FEB 21 AM 10:10

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Plaintiff,

vs.

Case No. CV-S-00-1355-RLH
ORDER
(Motion to Dismiss #62)

NEVADA DEPARTMENT OF PAROLE AND PROBATION, et al.,
Defendants.
_____/

Before the Court is Defendant Chuck Gate's **Motion to Dismiss** (#62), filed January 10, 2003. The Court has also considered Plaintiff's Oppositions (#64), filed January 16, 2003.

BACKGROUND

On November 13, 2001, Plaintiff, Franklin Vipperman, filed a Civil Rights Complaint, in proper person, against Defendant Department or Parole and Probation and four individuals as defendants. Plaintiff's Complaint alleges civil rights violations under 42 U.S.C. Section 1983, violation of Racketeer Influenced and Corrupt Organizations Act ("RICO") of 1970; and violations of Plaintiff's first, Fifth, Sixth and Fourteenth Amendment rights.

The Court previously dismissed the Nevada Division of Parole and Probation, Order #35, and three of the four

individual defendants, Concha, Compston, and Jeanquart, Order #59. Defendant Gates now files this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), upon the ground that Plaintiff has failed to state a claim upon which relief may be granted.

Plaintiff is currently on parole after serving a sentence of life imprisonment, with the possibility for parole, for his 1978 conviction of Second Degree Murder for shooting William "Frenchy" Parquette on April 20, 1973. Plaintiff has always maintained that he is innocent, and alleges that he was framed, first by the "real" murder, and later by police, prosecutors, a trial judge, his defense attorneys, legal counsel for the Nevada Attorney General's Office, and Defendant Nevada Department of Parole and Probation.

Plaintiff's pro se complaint is conclusory and only vaguely describes facts in support of his four causes of action. Plaintiff's first cause of action appears to assert that the Department of Parole and Probation conspired with certain individuals "to keep Plaintiff in prison for the rest of his life." Compl. at 7, 1.14. It appears that this allegation relates to a parole hearing held on July 29, 1981, Exhibits 17 and 18 attached to Complaint. The second claim also challenges the denial of Plaintiff's request to modify his sentence. Plaintiff's fourth claim, appears to assert that the Department's file, relating to the Plaintiff, contains false information. This claim appears to be based upon Plaintiff's repeated assertions that he was framed during his underlying murder conviction, and therefore, documents and records related to that conviction are false, and the Defendants "have further relied upon same to a constitutionally significant degree to deprive the Plaintiff of his liberty and freedom." Comp. At 12, lines 24-25.

Plaintiff's claim is based on his apparent belief that after serving ten years on parole, he has the right to have his sentence changed from life to twenty years, so that he may be completely discharged from parole.

DISCUSSION

Plaintiff asserts he is seeking injunctive and declaratory relief. Defendant seeks dismissal of Plaintiff's Complaint upon the grounds that: (1) Plaintiff failed to timely serve the Summons and Complaint pursuant to Fed. R. Civ. P. 4; (2) Plaintiff fails to state a claim upon which relief can be granted; and (3) Defendant, as a state officer, is not subject to suit under 42 U.S.C. Sections 1983, 1985, or 1986 and is entitled to Eleventh Amendment immunity with respect to official capacity suits.

Motion to Dismiss Standard Under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Yamaguchi v. U.S. Dept. of the Air Force, 109 F.3d 1475, 1481 (9th. Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." Epstein v. Wash. Energy Co., 83 F3d 1136, 1140 (9th. Cir. 1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th. Cir. 1988).

Service of Summons and Complaint Pursuant to Fed. R. Civ. P. 4(m)

Defendant argues that Rule 4(m) provides that service of the summons and complaint is to be accomplished within 120 days after filing the complaint. Fed. R. Civ. P. 4(m). Plaintiff filed his Complaint on November 13, 2000 and Defendant Gates was properly served on or about December 19, 2002, over two

years after the complaint was filed.

The Court notes that Plaintiff is pro se and was confused as to what constituted proper service on the individual Defendants. The Court granted Plaintiff an extension of time to carry out appropriate service with a warning that failure to do so in a timely manner would subject Plaintiff to dismissal for violating the time to serve the remaining Defendants with summons and complaint. Order 51. The Court finds that while Plaintiff's service on Defendant was late, the Court will consider the service proper.

Plaintiff's Claims Fail as a Matter of Law

It is unclear whether Plaintiff is attempting to challenge his murder conviction, however, such a claim is improper under Section 1983. Edwards v. Balisok, 520 U.S. 341 (1997). The Supreme Court held that 42 U.S.C. Section 1983 cannot be used to assert allegations which would necessarily imply the invalidity of punishment imposed. See also Butterfield v. Bail, 120 F.3d 1023 (9th. Cir. 1977) (claim that false information was used in parole proceeding not cognizable under Section 1983). Plaintiff is also barred from challenging decisions of the parole board. Id. At 1024. (Allegation that false information was used to find inmate ineligible for parole necessarily implicates the validity of the denial of parole and, therefore, the inmate's continuing confinement).

Additionally, Plaintiff has no right to a modification of his sentence as that is a discretionary act. NRS 176.033(2). The

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The statute provides in pertinent part:

> [after 10 consecutive years on prole from a life sentence] the state board of parole commissioners, upon the recommendation of the division, may petition the court of original jurisdiction requesting a modification of sentence... Upon hearing the recommendation of the state board of parole commissioners and good cause appearing, the court may modify the original sentence...

statute provides that the parole board "may" petition the court to modify the parolee's sentence and the court "may" grant the modification. Id. Therefore, Plaintiff cannot challenge the decision to deny his request for modification. See Neal v. Hargrave, 770 F. Supp, 553m 557-58 (D. Nev. 1991) (Plaintiff has no property right in discretionary work credits therefore cannot make a constitutional challenge). Finally, the Court is unsure of the exact nature of the fourth claim in the Complaint concerning alleged false information in the Department's file, however, according to Butterfield, 120 F.3d at 1023, Plaintiff cannot contest his conviction therefore the "information" concerning his crime cannot be challenged in this action. Therefore, the fourth claim fails to allege any cognizable constitutional claim.

Finally, Section 1983 requires personal involvement for liability to attach. Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680 (9th. Cir. 1984). Liability under Section 1983 requires: (1) personal involvement in the constitutional deprivation of (2) causal connection between a supervisor's wrongful conduct and the constitutional violation. Mackinney v. Nielsen, 69 F.3d 1002, 1008 (9th. Cir. 1975).

Defendant is named in Plaintiff's third cause of action as the individual to whom Plaintiff presented "hundreds of trial transcripts, documents, court records, police reports, testimonies, scene of the crime and autopsy photographs, newspaper articles, parole board hearing transcripts, and numerous other documentary evidence." Complaint p. 11. Plaintiff explains that Defendant reviewed these materials in his presence and later the Defendant informed the Plaintiff over the telephone that "he had formulated the appropriate papers and forwarded them to the "higher ups" in Carson City requesting the Plaintiff's request for release from parole be granted." Complaint p. 11. Plaintiff has not alleged any personal actions by the Defendant that could support a 1983

claim.

Plaintiff is also unable to allege claims under Sections 1985 or 1986. Section 1985(3) applies to conspiracies to violate Section 1983. Plaintiff also references Section 1985(2), however, Plaintiff fails to allege any facts that support a claim under this subsection. A complaint must specify the actual alleged conspiracy actions. See Karim-Phanhi v. LA Police Dep't, 839 F.2d 621, 626 (9th. Cir. 1988). Plaintiff cannot proceed under Section 1985. Moreover, conspiracies to violate a plaintiff's constitutional rights fall under 42 U.S.C. 1985(3) which requires a class based, invidiously discriminatory animus. Bagley v. CMC Real Estate Corp., 923 F.2d 758, 763 (9th. Cir. 1991). Section 1985(3) requires that "the plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights." Gerritsen v. de la Madrid Hurado, 819 F.2d 1511, 1519 (9th. Cir. 1987). Plaintiff's complaint makes no allegation of a class-based animus to support a Section 1985(3) claim. Finally, a Section 1986 claim requires a valid Section 1985 claim. Malsh v. Garcia, 971 F. Supp. 133 (S.D.N.Y. 1997). As Plaintiff has not asserted a viable section 1985 claim, any Section 1986 claim must also fail.

Defendant in his Official Capacity

Defendant is sued, in part, as a state official. A state is not a person for the purposes of 42 U.S.C. Section 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Likewise, state employees acting in their official capacities are immune. Doe v. Lawerence Livermore Nat. Laboratory, 131 F.3d 836, 839 (9th. Cir. 1997). The same reasoning is applicable to 42 U.S.C. Sections 1985 and 1986. See Rode v. Dellarciprete, 317 F. Supp. 721 (M.D. Pa. 1985). Therefore, Defendant cannot be sued under these statutes in his official capacities.

Furthermore, Defendant cannot be sued in federal court in

his official capacity unless there has been a waiver of the Eleventh Amendment. Congress did not abrogate the Eleventh Amendment when it enacted Section 1983, Rounds v. Oregon State Board of Higher Education, 166 F.3d 1032, 1053 (9th. Cir. 1999), and the state of Nevada has elected to maintain its Eleventh Amendment immunity. NRS 41.031(3). The same analysis is applicable to Sections 1985 and 1986. Therefore, Defendant is immune from suit on these claims in his official capacities.

CONCLUSION

For the foregoing reasons the Court must dismiss Plaintiff's causes of action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant Gate's Motion to Dismiss (#62) is GRANTED.

Dated: February 20, 2002.

"s/Roger L. Hunt"
United States District Judge

D-8

FILED
FEB 24 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANKLIN D. VIPPERMAN,
Petitioner,

vs.

NEVADA DEPARTMENT OF PAROLE AND PROBATION et al.,

Respondents.
_____/

JUDGMENT IN A CIVIL CASE

CV-S-00-1355 RLH (RJJ)

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered
It's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision Has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motions to dismiss (#52 & #55) are granted. Judgment is entered for the defendants and against plaintiff Franklin D. Vipperman.

February 24, 2003

LANCE S. WILSON, CLERK
By:_____
Deputy Clerk

(2)

No. 03-453

Supreme Court, U.S.
FILED
OCT 2 3 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FRANKLIN D. VIPPERMAN,

Petitioner,

vs.

CARLOS CONCHA; JOHN COMPSTON; CHUCK GATES; JEFFREY JEANQUART; and NEVADA DIVISION OF PAROLE AND PROBATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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17 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER PETITIONER'S CIVIL RIGHTS CLAIMS PURSUANT TO 42 USC §§ 1983, 1985(3) AND 1986 AGAINST THE NEVADA DIVISION OF PAROLE AND PROBATION AND AGAINST THE INDIVIDUAL DEFENDANTS IN THEIR OFFICIAL CAPACITIES ARE BARRED BY THE ELEVENTH AMENDMENT.

WHETHER PETITIONER'S CIVIL RIGHTS CLAIMS PURSUANT TO 42 USC §§ 1983, 1985(3) AND 1986 AGAINST THE INDIVIDUAL DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES WERE PROPERLY DISMISSED BECAUSE THE APPLICABLE STATUTES OF LIMITATIONS HAVING EXPIRED.

WHETHER PETITIONER'S CIVIL RIGHTS CLAIMS PURSUANT TO 42 USC §§ 1983, 1985(3) AND 1986 WERE PROPERLY DISMISSED FOR HIS FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED AND THE PROPER APPLICATION OF HECK V. HUMPHREY, 512 U.S. 477, 486-487 (1994).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	5
LEGAL ARGUMENT	6
A. The Eleventh Amendment Bars this Action	6
B. Concha, Compton, Jeanquart and Gates are Immune from suit in their Official Capacity	7
C. Vipperman's Claims Fail as a Matter of Law	8
1. Section 1983	8
2. Sections 1985 and 1986 Claims Fail as a Matter of Law	10
D. Vipperman's Civil Rights Claims are Barred by the Applicable Statutes of Limitations	11
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 122 L.Ed.2d 34, 113 S.Ct. 753 (1993) 10

Butler v. Elle, 281 F.3d 1014 (9th Cir. 2002) 10

Butterfield v. Bail, 120 F.3d 1023 (9th Cir. 1997) 8

Doe v. Lawrence Livermore Laboratory, 131 F.3d 836 (9th Cir. 1997) 7

Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) 8

Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511 (9th Cir. 1987) 10

Heck v. Humphrey, 512 U.S. 477 (1994) 4, 5, 8

Karim-Panahi v. L.A. Police Dept., 839 F.2d 621 (9th Cir. 1988) 10, 11

Mackinney v. Nielsen, 69 F.3d 1002 (9th Cir. 1995) 9

McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1992) 10

McDougal v. County of Imperial, 942 F.2d 668 (9th Cir. 1991) 11

Northern Nev. Ass'n Injured Workers v. Nevada SIIS, 107 Nev. 108, 807 P.2d 728 (1991) 7

O'Connor v. Nevada, 686 F.2d 749 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982) 6, 7

Perez v. Seevers, 869 F.2d 425 (9th Cir. 1989) 11

Rode v. Dellarciprete, 617 F.Supp. 721 (D.C. Pa. 1985) 7

TABLE OF AUTHORITIES – Continued

Page

Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032 (9th Cir. 1999) 7

Taylor v. List, 880 F.2d 1040 (9th Cir. 1989) 9

Vipperman v. State, 96 Nev. 592 (1980) 5, 6

Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) 6, 7

Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984) 9

STATE STATUTES

NRS 41.031(3) 7

UNITED STATES CODES

42 USC § 1983 ..... *passim*

42 USC § 1985 ..... 1, 7, 10, 11

42 USC § 1985(3) 10

42 USC § 1986 ..... 1, 7, 10, 11

Fed.R.Civ.P. 12(b)(6) 3

Fed.R.Civ.P. 60(b) 3

OPINIONS BELOW

The opinions of the court of appeals and of the District Court are unreported but have been included in Petitioner's Appendix ("App.").

STATEMENT OF THE CASE

Franklin D. Vipperman (hereinafter "Vipperman") filed a complaint, on November 13, 2000, against the Respondents Nevada Division of Parole and Probation ("NDOPP"), John Compton ("Compton"), Carlos Concha ("Concha"), Jeffrey Jeanquart ("Jeanquart") and Chuck Gates ("Gates") resulting in the docketing of United States District Court, District of Nevada, Case No.: CV-S-00-1355. Vipperman's complaint alleged civil rights violations under 42 USC §§ 1983, 1985 and 1986; violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970; and violations of his First, Fifth, Sixth and Fourteenth Amendment rights. ER 1.

Vipperman filed his action in proper person. His complaint is conclusory and only vaguely describes facts in support of his contentions. ER 1-15. The complaint asserts four (4) causes of action. ER 1-15. The first claim appears to assert that Respondent NDOPP conspired with certain individuals, including former federal judge Harry Claiborne, "to keep Plaintiff [Vipperman] in prison for the rest of his life." ER 7. The second claim appears to challenge Respondent NDOPP's decision not to "modify" Vipperman's sentence after he served (10) years of his parole, and complains of a parole violation charge filed on August 8, 1997. ER 9-10. The third claim in Vipperman's complaint

challenges the denial of his request to be released from parole despite his presenting to Respondent Gates,

> . . . documentary evidence, which unequivocally proved that Plaintiff had been framed for murder by Police and Prosecutors, railroaded through two different trials by a trial judge, and sold out by his alleged defense attorney at trial, and on Appeals. And further kept in Prison through a conspiracy between the Parole Board, Police, Prosecutors, alleged Defense Attorneys, and Trial Judge. ER 11.

Vipperman further claims Respondent Jeanquart allegedly informed him that Respondent Concha had denied Petitioner's request for release from parole. ER 11. Vipperman's fourth claim, the most vague of the four causes of action, appears to assert that Respondent NDOPP's file related to him contains false information which he has been unable to rebut. ER 12-13.

Vipperman's complaint sought a declaratory judgment that his rights had been violated and injunctive relief barring Respondents from harassing him during the pendency of the action. ER 14. The complaint also prayed for relief in the form of an "honorable discharge" from parole. ER 14. Lastly, Vipperman sought fifty million dollars in compensatory and punitive damages. ER 14.

On March 5, 2001, Vipperman filed a "Petition to Revisit and Reconsider Plaintiff/Petitioner's Petition for a Writ of Habeas Corpus" in his instant civil rights action. ER 166-172. On April 12, 2001, the District Court entered an Order denying Vipperman's Petition. ER 658-659. The District Court concluded the court's jurisdiction over the section 1983 suit did not vest the Court with authority to review rulings issued in previous lawsuits or petitions

filed by Vipperman challenging his underlying conviction. ER 659. The court advised Vipperman that it was unlikely he could file a timely motion for reconsideration of his Petition for Writ of Habeas Corpus, filed on March 10, 1986, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, which requires that motions for reconsideration be filed within one year after the judgment or order was issued. ER 659.

On March 8, 2001, Respondent NDOPP filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). ER 161-165. Vipperman filed an opposition to this motion to dismiss. ER 578-588. On April 17, 2001, the District Court entered its Order granting Respondent NDOPP's motion to dismiss on Eleventh Amendment immunity grounds. ER 662-667.

Because Vipperman failed to state a claim upon which relief could be granted, Respondents Compton, Jeanquart and Concha also filed motions to dismiss. ER 702-708 and 718-724. Vipperman filed oppositions to Respondents' motions to dismiss. ER 709-717 and 725-733. On December 19, 2002, the District Court entered its Order granting these motions to dismiss on grounds that Respondents Compton, Jeanquart and Concha were immune from suit in their official capacities and because Vipperman failed to state a claim upon which relief could be granted. ER 734-740.

Respondent Gates filed a motion to dismiss based on Vipperman's failure to state a claim. ER 742-748. Vipperman filed an opposition to this motion to dismiss. ER 749-761. On February 21, 2003, the District Court entered its Order granting Respondent Gates' motion to dismiss based on grounds that he was immune from suit in his official capacity and because Vipperman failed to state a claim upon which relief could be granted. ER 767-773.

On March 5, 2003, Vipperman filed a Notice of Appeal resulting in the docketing of Case No. 03-15416 in the Ninth Circuit Court of Appeal. Upon the completion of briefing, the Ninth Circuit, on July 25, 2003, issued its Memorandum Decision. Therein the court affirmed the District Court's decisions and held:

> Vipperman's claims against NDOPP and his monetary claims against the individual defendants sued in their official capacities are barred by the Eleventh Amendment.
>
> As for the individual defendants sued in their individual capacities, [for] parole decisions in 1981 and 1997 . . . [t]he civil rights statutes can provide Vipperman with no relief because the applicable statutes of limitations have expired.
>
> Vipperman cannot use the civil rights statutes to challenge the NDOPP's failure to modify his life sentence after he served ten years on parole. Vipperman's claim is barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), because success on the claim would necessarily imply the invalidity of Vipperman's current parole status.

App. A-1 through A-4.

Subsequently, Vipperman filed a Petition for Writ of Certiorari with this Court resulting in the docketing of the instant matter. Although Vipperman identified seven issues for consideration by the Ninth Circuit Court of Appeals, herein he identifies only three issues, which are actually just a subset of Vipperman's Seventh issue presented to the Ninth Circuit Court of Appeals: "Whether the lower Federal court erred by granting the Defendant's/ Appellee's motions to dismiss." Nevertheless, Vipperman's instant petition for writ of certiorari, attempts to address

the merits of his claims, i.e. his allegedly wrongful conviction and various conspiracies relative to his incarceration and parole, as opposed to addressing the basis of the dismissal of his claims. Vipperman's instant petition fails to address the Eleventh Amendment immunity of the State and State Officials, his delay in bringing his claims resulting in the bar by the applicable statute of limitations and the applicability of *Heck v. Humphrey* in barring his civil rights claims where his underlying criminal conviction continues to stand unchallenged. As a result, Respondents herein present the instant opposition to Vipperman's petition for writ of certiorari.

STATEMENT OF FACTS

Vipperman is currently on parole pursuant to a sentence of life imprisonment, with the possibility of parole, for his 1978 conviction of second degree murder, for shooting William Parquete on April 20, 1973. ER 663. Appellant has always maintained that he is innocent and that he was framed, first by the "real" murderer, and later by police, prosecutors, a trial judge, his defense attorneys, legal counsel for the Nevada Attorney General's Office and by the Appellee NDOPP. ER 663. Nevertheless, on direct appeal, the Nevada Supreme Court found that the State presented its theory that "a hostile relationship existed between [Vipperman] and the victim who were partners in an auto body and used automobile business." *Vipperman v. State*, 96 Nev. 592, 593 (1980). The state showed " . . . that Vipperman wanted his money out of the business and that the victim would not give it to him . . . [that] the partnership agreement provided that in the event of the death of either party, the surviving partner would become the sole

owner of all partnership assets . . . [and] that [Vipperman] dissolved the partnership with a shotgun." *Id.*

In support of the state's theory of the case, an eyewitness testified that "he heard Vipperman threaten the victim during several telephone conversations," and then on April 20, 1973 at about 7:00 p.m., he "heard a shot and a scream" and saw "[t]he victim . . . yelling 'Frank shot me' as he held his wrist and was spinning around." *Id.* "The witness was about to help when he saw Vipperman standing nearby with a gun." *Id.* "The witness turned, the gun went off, and he crawled underneath a car before running to the building next door." *Id.* Additional evidence was presented that on the day of the homicide Vipperman purchased a shotgun. *Id.* at 594. Also, Vipperman was unable to account for his whereabouts at the relevant time of the murder. *Id.* at 593. In spite of the litigation of direct and post-conviction appeals, Vipperman has not been able to successfully challenge his conviction based upon the above facts.

LEGAL ARGUMENT

A. The Eleventh Amendment Bars this Action

Under the Eleventh Amendment a state or its agencies cannot be sued in federal court unless the state waives its immunity or Congress exercises its power under section 5 of the Fourteenth Amendment to override immunity. *O'Connor v. Nevada*, 686 F.2d 749, 750 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 491, 74 L.Ed.2d 633 (1982); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The state of Nevada has explicitly refused to waive its immunity to

suit under the Eleventh Amendment. NRS 41.031(3); *See also O'Connor*, 686 F.2d at 750. "Congress in passing section 1983, had no intention to disturb the States' Eleventh Amendment Immunity." *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1035 (9th Cir. 1999). Accordingly, as neither the State of Nevada nor NDOPP waived its immunity, the District Court and the Ninth Circuit properly concluded Respondent NDOPP was shielded from liability by its Eleventh Amendment sovereign immunity. ER 662-667, App. A-1 through A-4.

B. Concha, Compton, Jeanquart and Gates are Immune from Suit In their Official Capacity

Vipperman brought this action pursuant to 42 USC § 1983. ER 1. Neither a State, nor its officials acting in their official capacities, are "persons" under section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45. Thus, State employees acting in their official capacities are immune. *Doe v. Lawrence Livermore Laboratory*, 131 F.3d 836, 839 (9th Cir. 1997). The same reasoning is applicable to 42 USC §§ 1985 and 1986. *Rode v. Dellarciprete*, 617 F.Supp. 721 (D.C. Pa. 1985); *Northern Nev. Ass'n Injured Workers v. Nevada SIIS*, 107 Nev. 108, 114, 807 P.2d 728 (1991). As a result, the District Court and the Ninth Circuit properly concluded Respondents Concha, Compton, Jeanquart and Gates could not be sued under these statutes in their official capacities. ER 737, ER 772 and App. A-1 through A-4.

Furthermore, Respondents Concha, Compton, Jeanquart and Gates cannot be sued in their official capacity in federal court unless there has been a waiver of the Eleventh Amendment by the State of Nevada. As there was not

a waiver of immunity, by the State of Nevada nor by Respondents Concha, Compton, Jeanquart and Gates, the District Court and the Ninth Circuit properly concluded that Respondents are immune from suit on these claims in their official capacities.

C. Vipperman's Claims Fail as a Matter of Law

1. Section 1983

To the extent Vipperman's complaint challenges his murder conviction, such claims are improper under 42 USC § 1983. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997). This Court has held that 42 USC § 1983 could not be used to assert allegations which would "necessarily imply the invalidity of the punishment imposed." *Edwards*, 540 U.S. at 648; *see also Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir. 1997) (claim that defendants relied on false information in plaintiff's prison file to find him ineligible for parole, necessarily implicated the validity of plaintiff's continuing confinement and thus was not cognizable under section 1983).

Vipperman is also barred from challenging decisions of the parole board. *Id.* at 1024 (allegation that false information was used to find inmate ineligible for parole necessarily implicated the validity of the denial of parole, and therefore the inmate's continuing confinement). To the extent he alleges false information is contained in his parole file, such claims are tantamount to a challenge to his conviction and thus the "information" relating to his crime cannot be challenged in this action. *Butterfield*, 120 F.3d at 1024.

Additionally, § 1983 requires personal involvement for liability to attach. Liability under § 1983 only arises upon a showing of personal participation by a defendant. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *See also Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680-81, (9th Cir. 1984). A supervisor may be liable under § 1983 only if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Mackinney v. Nielsen*, 69 F.3d 1002, 1008 (9th Cir. 1995).

Vippermen did not allege any personal actions by Respondents Concha, Compton or Jeanquart and therefore cannot support a § 1983 claim against them.

Additionally, Vipperman's third claim names Respondent Gates as the individual that he "personally appeared before" and presented "hundreds of Trial Transcripts, Documents, Court Records, Police Reports, Testimonies, Scene of the Crime and Autopsy Photographs, News Paper Articles, Parole Board Hearing Transcript, and numerous other documentary evidence . . . " ER 11. Vipperman alleges Respondent Gates reviewed these materials in his presence and later informed Vipperman "over the telephone," that "he had formulated the appropriate papers and forwarded them to the 'higher ups' in Carson City, requesting the Plaintiff's request for release from parole be granted." ER 11. However, Vipperman's third claim does not allege any personal actions by Respondent Gates that could support a § 1983 claim.

2. Sections 1985 and 1986 Claims Fail as a Matter of Law

Vipperman's claims under §§ 1985 or 1986 must also fail. A claim under § 1985 must allege facts to support the allegation that defendants conspired together. *Karim-Panahi v. L.A. Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988). Vipperman references section 1985(2), however, he fails to allege any facts that support a claim under this subsection. A complaint must specify the actual alleged conspiracy actions. *Karim-Panahi*, 839 F.2d at 626. Vipperman fails to allege any conspiratorial actions by Respondents Concha, Compton, Jeanquart or Gates and therefore cannot proceed under § 1985.

Section 1985(3) applies to conspiracies to violate § 1983. To state a claim for conspiracy under § 1985(3), "'a plaintiff must show . . . (1) that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action,' . . . and (2) that the conspiracy 'aimed at interfering with rights' that are 'protected against private, as well as official, encroachment.'" *Butler v. Elle*, 281 F.3d 1014, 1028 (9th Cir. 2002) (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68, 122 L.Ed.2d 34, 113 S.Ct. 753 (1993) (citations omitted). The plaintiff must be a member of a class that requires special federal assistance in protecting its civil rights. *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1992); *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1519 (9th Cir. 1987). In this case, Vipperman's complaint did not allege any class-based discrimination supporting a claim under § 1985(3).

Finally, a claim under § 1986 can be stated only if the complaint alleges a valid claim under § 1985. *Karim-Panahi*, 839 F.2d at 626. Since Appellant failed to assert a viable § 1985 claim, any § 1986 claim also must fail.

D. Vipperman's Civil Rights Claims are Barred by the Applicable Statutes of Limitations.

As pointed out by the Ninth Circuit Court in its Memorandum Decision, App. A-1 through A-4, Vipperman's first two sets of allegations challenge parole decisions made by Respondent NDOPP in 1981 and 1997. A two year statute of limitations applies to § 1983 claims in the State of Nevada. *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir. 1989). Actions under § 1985 are likewise governed by the same statute of limitations that applies to § 1983 actions. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991). And finally, 42 USC § 1986 provides a one-year limit. Vipperman waited until November of 2000 to bring his instant claims. The statutes of limitations obviously have expired relative to such claims based on the allegations of NDOPP actions in 1981 and 1987.

CONCLUSION

Respondents respectfully request that the Court deny Vipperman's Petition for Writ of Certiorari; the lower courts' dismissal of Appellant's claims being based on the proper application of Eleventh Amendment Immunity, Vipperman's failure to state a claim and failure to timely bring such claims.

Dated this 23 day of October, 2003.

Respectfully submitted,

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